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In The District Court of Appeals
Third District of Texas
Austin, Texas

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JEFFREY D. KYLE
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No. 03-18-00650-CV

Alex E. Jones, Infowars, LLC, Free Speech Systems, LLC and Owen Shroyer

Appellants

v.

Neil Heslin

Appellee

On Appeal From Cause Number D-1-GN-18-001835
53rd District Court, Travis County, Texas
Hon. Scott Jenkins Presiding

Appellants' Response to Appellee's Motion For Sanctions

I. SUMMARY OF RESPONSE

Appellee Heslin's motion for Rule 52.11 sanctions should be denied for three reasons:

- Heslin motion is groundless -- Rule 52 does not authorize sanctions since this appeal is not an original proceeding in this appellate court, and Rule 52 only applies to original proceedings.
- InfoWars appellants had good grounds for their motion to enlarge their brief word count, and Heslin shows no evidence of any bad faith by Infowars appellants' in filing their motion to enlarge.
- InfoWars appellants had good grounds for their motion to expedite, and Heslin shows no evidence of any Infowars appellants' bad faith in filing their motion to expedite.

II. BACKGROUND FACTS

A. Two related appeals – *Heslin* and *Pozner*

This case is factually and procedurally related to *Jones et al. v. Pozner et al.*, Cause N. 03-18-0064-CV, pending in this Court.

Plaintiffs in both cases are parents of children killed in the Shady Hook Elementary School shooting in December 2012. The plaintiffs in both cases sued defendants including appellants here -- Alex Jones, Infowars, LLC, and Free Speech Systems, LLC. The plaintiffs in both cases allege that the defendant-appellants defamed plaintiffs in defendants' media broadcasts in which defendants

raised issues of inconsistencies or unanswered questions in government and news media reports related to the shooting.

Plaintiff-Appellees' counsel in both cases is Heslin's counsel here. Both cases involve an appeal from the denial of defendants' Texas Citizens Participation Act motion to dismiss in the trial court.

Both cases involve the respective plaintiffs' filing in the trial court hundreds of pages of expert opinion affidavits and referred-to exhibits. In both cases, defendants objected in the trial court to much of the proffered expert opinion affidavits and their bolstering exhibits. In both cases the volume of defendants' objections with record and authority citations mirrored the volume of the plaintiffs' proffered affidavits and exhibits.

In both cases, the trial court did not rule on the defendants' evidentiary objections before ruling on the defendants' TCPA motions to dismiss. In both cases, that failure of the trial court to rule on the objections is one of the appellants' points of error on appeal to this Court.

B. The Pozner appeal

In Pozner, InfoWars' appellants brief was due on November 14, 2018. On November 6, InfoWars appellants sought leave to enlarge the word count of their appellants' brief and for expedited consideration of that motion when it became apparent during the briefing drafting process that arguing the evidentiary

objections to the Pozner plaintiffs' 255 pages of affidavits and related exhibits (*see* Pozner appeal Clerk's Record 896-1151) could be more clearly and concisely done if the trial court objections could be laid out in appellants' brief in more detail for this Court. [A copy of the InfoWars Appellants' Motion to Enlarge Length of Brief in the Pozner case is attached as **Exhibit A** to Appellee's Response to Appellants' Motion to Expedite and Motion to Enlarge Length of Brief And Appellee's Motion for Sanctions Under Rule 52.11, filed in this appeal on December 4, 2018 ("Appellee's Motion")].

On November 7, in his response to InfoWars' motion to enlarge, counsel for the Pozner appellees (Heslin's counsel here) argued against the InfoWars appellants' motion to enlarge, saying that "the record is unusually thin," and the "[a]ppelants should be capable of arguing against the denial of a single preliminary motion within the word limitations of this Court." Exhibit C to Appellee's Motion, at pp. 1, 2.

Then, on November 19, five days after seeing the InfoWars appellants' brief presenting the points of error concerning the evidence, the objections and the trial court's failure to rule on evidentiary objections, counsel for the Pozner appellees (and for Heslin here) performed a notable about-face, and took the opposite positon from his prior argument of a "thin record" when InfoWars sought enlargement – Heslin's counsel here filed his Pozner appellees' own motion to enlarge his own

brief word limit because the record was so large. Counsel declared that Pozner's own trial court "evidence" covered a "five-year history," and included "twenty hour-long videos." Appellee's Motion For Enlargement Of Brief Word Count, filed in Pozner case on November 19, p. 2. Pozner's counsel said they needed to "quote extensively" from this volume of evidence, and their "challenge of responding" is "complicated by the nature of the source material." *Id.*

On November 27, the Court granted the Pozner appellees' request to enlarge their appellees' brief.

C. Appellants' motions to enlarge and motion to expedite in this appeal

In this appeal, six days later on December 3, InfoWars appellants here filed their motion to enlarge their word count for their upcoming appellants' brief.

InfoWars appellants set out two bases for their motion:

- One, like Heslin's counsel's argument in the Pozner case, the volume of Heslin's trial court affidavits and exhibits here and the resulting similar volume of objections justified an enlargement for briefing those issues.
- Two, Heslin's counsel obtaining a similar brief enlargement just the week before in the similar Pozner appeal based on a similar volume of the evidence and objections and the resulting issue.

See Appellants' Motion to Enlarge Length of Brief, filed December 3, 2018, pp. 1-3.

There is also a third reason that appears in the Court's records showing why the InfoWars' motion to enlarge here is warranted – Heslin's counsel in the Pozner appeal telegraphed in the Pozner appeal that he intended to take advantage of appellants' word count limitation in this case in this Court and intending to argue insufficient briefing of the appellants' objections. *See* Appellees' Motion for Enlargement of Brief Word Count in No, 03-00603-CV, *Jones et al. v. Pozner et al*., filed Nov. 19, 2018, at p. 3 (complaining InfoWars appellants in the Pozner appeal on the evidentiary objections "abandoned all pretense at prose" in their brief "argument" and "no detail"). Heslin has now done exactly that. See Appellee's brief p. 67, filed December 26, 2018.

III. ARGUMENT AND AUTHORITIES

A. Heslin's motion for sanctions here

On December 4, Heslin filed his response to the InfoWars' motion to enlarge and combined it with his motion for Rule 52.11 sanctions. *See* Appellee's Response to Appellants' Motion to Expedite and Motion to Enlarge Length of Brief and Appellees' Motion for Sanctions under Rule 52.11 ("Appellee's Motion").

In his motion for sanctions, Heslin alleges the InfoWars appellants sought expedited consideration of InfoWars' motion to enlarge its appellee's brief word count in "bad faith" and without "good cause." Heslin alleges that InfoWars had "no good cause" to file its motion to enlarge the word count (Appellee's Motion p. 4) and had "no good cause" to seek an expedited ruling on its motion to enlarge (Appellee's Motion p. 3).

B. Heslin's motion is groundless because Rule 52.11 does not apply to this appeal

Rule 52.11, TEX. R. APP. PROC., allows the court in certain proceedings to impose "just sanctions" against a party who does not act in "good faith." The rule requires one of four acts to show lack of "good faith:"

> (a) filing a petition that is clearly groundless;
>
> (b) bringing the petition solely for delay of an underlying proceeding;
>
> (c) grossly misstating or omitting an obviously important and material fact in the petition or response; or
>
> (d) filing an appendix or record that is clearly misleading because of the omission of obviously important and material evidence or documents.

If Rule 52.11 applies here, Heslin must establish that at least one of these four "prerequisites" under the rule or the court will deny sanctions. *In re Weisinger*, 2012 Tex. App. LEXIS 7643, at *10-11 (Tex. App. -- Houston [14th Dist.] Sep. 6, 2012, no pet.).

Rule 52.11 sanctions are within the court's discretion and are imposed "with prudence and caution and only after careful deliberation." *Walter v. Marathon Oil Corp*., 422 S.W.3d 848, 861 (Tex. App.—Houston [14th Dist.] 2014, no pet.), citing *In re Lerma*, 144 S.W.3d 21, 26 (Tex. App. -- El Paso 2004, orig. proceeding).

But Rule 52 is entitled "Original Proceedings" and, as its title says, applies only to original proceedings in a court of appeals or the Texas Supreme Court. Before the 1997 amendments to the Texas Rules of Appellate Procedure, there was no specific provision allowing an appellate court to impose sanctions relating to an original proceeding. After the 1997 amendments adding Rule 52.11, the appellate court may, on motion of any party or on its own initiative, and after notice and a reasonable opportunity to respond, impose just sanctions on a party or attorney who is not acting in good faith as indicated by one of the four acts. 10 DORSANEO, TEXAS LITIGATION GUIDE § 152.05 (2018).

Rule 52.11 says, "An original appellate proceeding seeking extraordinary relief - such as a writ of habeas corpus, mandamus, prohibition, injunction, or quo

warranto - is commenced by filing a petition with the clerk of the appropriate appellate court. The petition must be captioned "In re [name of relator]." TEX. R. APP. P. Rule 52.1. This original proceeding requirement is reflected in Rule 52.11's repeated references to sanctions in connection with a "petition."

An ordinary appeal from a trial court is not an original proceeding before the appellate court and Rule 52.11 does not apply. *See Keys v. Litton Loan Servicing, L.P.*, 2009 Tex. App. LEXIS 9017 at *29 (Tex. App.--Houston [14th Dist.] Nov. 24, 2009, no pet.)(denying Rule 52.11 motion for sanctions in an appeal from a trial court judgment, saying, "Texas Rule of Appellate Procedure 52.11 allows sanction awards in original proceedings," and is not "proper grounds or authority . . . to grant appellate sanctions in this case.").

Appellee Heslin's motion for sanctions under Rule 52.11 is groundless since that rule has no application to this appeal and his motion should be denied.

C. Appellants had good grounds for their motion to enlarge.

Ignoring the lack of application of Rule 52.11, Heslin goes on and makes several arguments of why there was no good cause for enlargement. Appellee's Motion, p. 4.

First, like he did in the Pozner appeal, Heslin's counsel here argues he cannot see why InfoWars requires "extra space to argue a single preliminary motion where no discovery occurred." *Id.* p. 5. Then, like in Pozner, counsel

performs his second about-face and takes the opposite position -- that the trial court record is large. Heslin's counsel complains InfoWars seeks to present to this Court the trial court's error in failing to rule on InfoWars' evidentiary objections set out in "one-hundred pages" of the clerk's record. *Id.*, pp. 4-5. But Heslin's counsel omits an obvious and material fact – Heslin's trial court expert opinions and bolstering exhibits, covered 294 pages of the clerk's record, many of those pages single spaced, and InfoWars had to specifically address that volume for the trial court. *See* CR: 1524-1818.

Second, Heslin's counsel again telegraphs, like he did in Pozner, that he will later claim in this case that appellants make "no argument" on appeal based on appellants' "bullet-point lists" of objections with authorities that were made necessary by the brief word limits. Appellee's Motion, p. 5.

Heslin here, like Pozner before, seeks to have it both ways – the Court should not grant appellants an enlarged word count because the trial court proceedings were limited, but the Court should grant Heslin an enlarged word count because the trial court evidence (and objections to it) were necessarily so voluminous. What's good for the goose is good for the gander -- InfoWars appellants viewed that they are entitled to an enlarged word count here for the same reason and it was proper to ask the Court to grant the InfoWars appellants' request.

D. Appellants had good grounds for their motion to expedite.

Continuing to ignore that Rule 52.11 only applies to original proceedings, Heslin's third argument against the InfoWars appellants' motion to enlarge dovetails with his arguments in his response on InfoWars' motion to expedite and Heslin's motion for sanctions.

Heslin argues InfoWars' motion to enlarge should be denied because all parties knew there were a large number of objections to Heslin's affidavits and exhibits, and the motion to enlarge should have been made "from the start of this appeal." *Id.* p. 5. Heslin argues InfoWars' motion to enlarge was not an emergency on the same basis -- the only emergency, Heslin argues, was appellants' briefing deadline. *Id.* p. 4. Based on this, Heslin asserts InfoWars' motions to expedite both here and in Pozner were done in "bad faith." *Id.* p. 4.

Heslin's first argument, that all could see that both the Heslin trial court evidence and the InfoWars objections were voluminous and motions to enlarge should have been anticipated, is belied by Heslin's counsel's own conduct in the Pozner case. In the Pozner case, Heslin's counsel did not move to enlarge Pozner's word count from "from the start," but only after Infowars sought to enlarge appellants' word count on the basis of the volume of evidence and objections. *See* Appellants' Motion to Enlarge Length of Brief filed November 6, 2018 and Appellees' Motion for Enlargement of Brief Word Count filed

November 19, 2018, both in Pozner No. 03-18-00603-CV. The question thus logically arises -- if Heslin's counsel in Pozner knew there the volume of evidence and objections should reasonably require an enlarged word count, why did he not file his own motion to enlarge there "from the start" but instead wait until he could see the InfoWars appellants' brief ?

Second, Heslin argues that the denial of appellant's motion to enlarge in the Pozner case somehow shows the InfoWars appellants' request to enlarge and expedite here shows "bad faith." Appellee's Motion pp. 1, 3. Heslin's argument is unfounded. Even under Rule 52.11, denial of a similar motion does not show groundlessness for sanctions. *In re J.W. Res. Expl. & Dev., Inc*., No. 07-09-0189-CV, 2009 Tex. App. LEXIS 6676, at *12 (App.—Amarillo Aug. 25, 2009, orig. proceeding) ("The denial of mandamus relief does not automatically establish that a petition was so clearly groundless as to warrant sanctions.")(citing *Lerma*, above). Similarly, an argument in an appellate brief—even if novel— that is properly presented and raises arguable points of error is not appropriate for sanctions. *See Hicks v. Western Funding, Inc.*, 809 S.W.2d 787, 788 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *see also Herring v. Welborn*, 27 S.W.3d 132, 145–146 (Tex. App.—San Antonio 2000, pet. denied) (appeal was not frivolous when appellant did not twist facts, subject matter was "less than perfectly

clear," and appellant's interpretation of prior opinions was "not out of touch with reality").

Finally, Heslin argues that InfoWars' filing of its motion to expedite on December 3 and asking the court for a ruling before InfoWars' brief deadline three days later was "harassing." Appellee's Motion pp. 3, 4. Heslin's counsel argues he was "occupied" on December 4 and the motion to expedite required him to work the evening of December 3. *Id.* p. 4. Counsel also argues that he has had to respond to two motions to expedite in two months involving two different TCPA related cases that he filed. In the Pozner appeal, counsel had to respond to a motion to expedite that was filed seven days before appellants' briefing deadline (*Id.* p. 2), and here, three days before appellants' briefing deadline (*Id.* p. 3). Seeking these two expedited rulings in the two cases is not evidence of harassment.

The whole reason for Rule 2, Tex. R. App. Proc., and Local Rule 55 is to allow parties to seek expedited rulings because events or cases sometimes justify it. Both the Pozner case and this case are TCPA cases. In such TCPA cases, the parties face what even Heslin's counsel admits in his Pozner motion to enlarge is "a unique challenge." *See* Appellees' Motion For Enlargement Of Brief Word Count, filed 11/19/2018 in Pozner, No. 03-18-00603-CV. And in each motion to expedite, InfoWars appellants' counsel followed the conference certification process. In the Pozner appeal, Heslin's counsel there opposed the motion to

expedite and in this case, Heslin's counsel gave no response. *See* Appellants' Motion to Expedite, filed December 3, 2018, at p.3, attached as **Exhibit B** to Appellee's Motion; and Appellants' Motion to Expedite in this case, filed December 3, 2018. Here, the timeline of events for Infowars' motion to expedite is shown above – the Court granted Heslin's counsel's motion to enlarge in the Pozner case November 27, six days before InfoWars appellants filed their motion here to enlarge and expedite based in large part on that recent grant in Pozner.

InfoWars appellants' conduct set out above shows good faith in both the motions to enlarge and motions to expedite in both cases. The concept of "bad faith" does not mean simply bad judgment or negligence, but the conscious doing of a wrong for a dishonest, discriminatory, or malicious purpose. *See*, applying Rule 13, TEX. R. CIV. PROC., *Mobley v. Mobley*, 506 S.W.3d 87, 94–95 (Tex. App.—Texarkana 2016, no pet.) (no evidence that party filed claim in bad faith or for purpose of harassment); *In re Hubberd Testamentary Trust*, 432 S.W.3d 358, 369 (Tex. App.—San Antonio 2014, no pet.) (sanctions unwarranted without evidence of bad faith). Heslin shows no evidence of bad faith or harassment by the InfoWars appellants in any motion.

IV. CONCLUSION AND REQUEST FOR RELIEF

The InfoWars appellants request the Court deny Appellee Heslin's motion for Rule 52.11 sanctions for three reasons:

(a) Heslin's motion is groundless -- Rule 52 does not authorize sanctions since this appeal is not an original proceeding in this appellate court, and Rule 52 only applies to original proceedings.

(b) InfoWars appellants had good grounds for their motion to enlarge their brief word count, and Heslin shows no evidence of any bad faith by Infowars appellants' in filing their motion to enlarge.

(c) InfoWars appellants had good grounds for their motion to expedite, and Heslin shows no evidence of any Infowars appellants' bad faith in filing their motion to expedite.

The InfoWars appellants request general relief.

Respectfully submitted,

/s/ Mark C. Enoch

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Appellants' Response to Appellee's Motion for Sanctions has been served upon the parties listed below via efile.txcourts.gov's e-service system on December 27, 2018:

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